Supreme Court, U.S.
FILED
AUG 28 2001
CLERK

No. 01-103

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,
v.

IZVESTIA NEWSPAPER and EDITORIAL STAFF
OF IZVESTIA NEWSPAPER,
Respondents.

On Petition for a Writ of Certiorari to the Virginia Supreme Court

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE U.S. AND RUSSIAN GOVERNMENTS, AS HAVE CONFLICTING U.S. DISTRICT COURTS, ARRIVED AT COMPLETELY OPPOSITE INTERPRETATIONS OF THE LONG DORMANT 1935 AGREEMENT. THEREFORE, THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS CONFLICT.

Despite the fact that the trial court vacated the default judgment and dismissed the case against Izvestia on the sole ground that service of process was not perfected pursuant to a 1935 agreement between the U.S. and Soviet Union,[1] Izvestia does not address the conflicts between the various courts which have interpreted this agreement or between the U.S. and Russian Governments' conflicting interpretations.

A. U.S. District Courts' Completely Opposite Interpretations

The 1935 agreement lay dormant and without judicial interpretation for almost sixty years. Beginning in 1993, at least seven courts have faced issues regarding service of process on Russian defendants.[2] In *Filus* and *Forum*

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[1] Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262, Pet. App. 15a-23a ["1935 agreement"].

[2] *See Flius v. LOT Polish Airlines*, 907 F.2d 1328 (2nd Cir. 1990), *on remand*, 819 F. Supp. 232 (S.D.N.Y. 1993); *Semtek International, Inc. v. Merkuriy, Ltd.*, C.A. No. 95-11920-RCL, 1996 U.S. Dist. LEXIS 22248 (D. Mass. 1996) (Pet. App. 33a); *J.L. Reardon Associates, Ltd. V. NPO Energomash*, C.A. No. 97-10409-GAO, (D. Mass. 1998) (Pet. App. 40a); *Konanykhine v. Izvestia*, Law No. 97-1139, (Arlington County (Va.) Cir. Ct. 2000) (Pet. App. 2a-7a); *Compagnie NOGA D'Importation et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y. 2000); *Base Metal Trading, S.A. v. Russian Aluminum*, No. 00-CIV-9627 (JGK),

Financial, the courts found that the 1935 agreement does not require service of process to be perfected via letters rogatory. In *Semtek*, *Reardon* and *Konanykhine*, the courts found exactly the opposite: that the 1935 agreement requires service of process to be perfected via letters rogatory. The language used by these courts shows just how far apart the two sets of opinions are: *Forum Financial* held that the 1935 agreement "merely sets forth procedures for executing letters rogatory" and "does not prohibit other means of service," while *Reardon* held that the 1935 agreement "requires service by letters rogatory." Pet. App. 27a and 40a.

B. The United States and Russian Governments' Completely Opposite Interpretations

Izvestia misstates the U.S. Government's position with regard to the interpretation of the 1935 agreement. In its Opposition, Izvestia stated "the United States and Russia have consistently interpreted the [1935 agreement] as being nearly exclusive, requiring that all service of process on Russian defendants by United States courts be via letters rogatory unless a Russian court—after a hearing—rules otherwise." Resp. Opp. 9. Izvestia also stated that "the United States and Russia completely agree: letters rogatory under the [1935 agreement] is virtually the sole method by which a United States plaintiff may serve a Russian defendant." Resp. Opp. 11. Moreover, Izvestia neglects to mention that on August 21, 2000, the U.S. Department of State sent a diplomatic note to the Russian Embassy in Washington, D.C. which clearly stated that the 1935 agreement does not require service of process to be perfected via letters rogatory. Reply App. 1a.

(S.D.N.Y. 2000); *Forum Financial Group, L.L.C. v. President and Fellows of Harvard College*, 199 F.R.D. 22 (D. Me. 2001).

1. *The Russian Government's Interpretation*

In mid-2000, the controversy surrounding the interpretation of the 1935 agreement reached the highest levels of both the U.S. and Russian Governments. In *Compagnie NOGA*, a civil case pending in the Southern District of New York, the Russian Government was a defendant that moved to dismiss the complaint because service of process was not perfected via letters rogatory. In a diplomatic note to the U.S. Department of State dated May 10, 2000, the Russian Embassy in Washington, D.C. claimed:

> [i]n accordance with the exchange of notes between the Parties of November 22, 1935, on the order of execution of letters of rogatory, these letters forwarded by the courts of the United States for execution must be sent through diplomatic channels, i.e. via the Embassy of the United States of America in Moscow and the Ministry of Foreign Affairs. Therefore, there is direct evidence of noncompliance by American courts with the existing procedures of notification of the defendant on the cases brought in by the 'NOGA' company. In this connection the Russian Side reserves for itself the right not to recognize any legal consequences resulting from the transmittal of judicial documents which has been performed in violation of the established procedure.

Reply App. 4a.

2. *The United States Government's Interpretation*

In response to the Russian Embassy's May 10, 2000 diplomatic note, the State Department transmitted a diplomatic note dated August 21, 2000 which stated:

> [i]n its note, the [Russian] Embassy advises that the Russian Federation objects to the manner of service in the [*Compagnie NOGA*] case, and asserts that service of process on the Russian Federation is governed by an

> Exchange of Notes [1935 agreement] between the United States and the Union of Soviet Socialist Republics of November 22, 1935.
>
> The Department of State wishes to inform the Embassy that it does not consider the Exchange of Notes to cover service of process in all instances on the Russian Federation. The Exchange of Notes addresses the manner in which the two governments will execute letters rogatory under their respective legal systems, when such requests are issued out of the courts of the other country. *The Exchange of Notes does not, however, purport to establish letters rogatory as the exclusive means of service of judicial process in the other state.* [emphasis added].

Reply App. 1a. In addition, the diplomatic note stated that "*where service of process is undertaken by means other than letters rogatory, the procedures in the Exchange of Notes have no application.*" [emphasis added]. *Id.* The United States also found that the 1935 agreement merely: addresses generally the procedures to be used in the execution of letters rogatory, whether these requests relate to taking evidence (the focus in the Exchange of Notes), to service of legal process, or to other forms of judicial assistance. *Id.* In holding that the 1935 agreement has no applicability when service is perfected by means other than by letters rogatory, the August 21, 2000 note quoted the *Filus* decision which stated "[p]lainly this exchange [1935 agreement] does not constitute an applicable international convention for service of judicial documents. It covers procedures for each country to honor letters rogatory issued by courts of the other country." *Id.*

C. Pending Cases involving Russian Defendants where Service of Process was not Perfected via Letters Rogatory

Presently, there are at least two cases pending where Russian defendants are involved in litigation in American courts: *Compagnie NOGA* and *Russian Aluminum*. Both of these cases involve multi-million dollar claims against Russian Defendants. In neither of these cases were the defendants served via letters rogatory. Therefore, the issue of service on a Russian defendant may arise again. In *Compagnie NOGA*, the defendant, the Russian Government, withdrew its motion to dismiss based on defective service prior to the Court's ruling on the issue. Reply App. 5a. In *Russian Aluminum*, some, but not all, of the defendants (one of whom is represented by Izvestia's counsel, Hogan & Hartson L.L.P.) entered into a stipulation waiving any objection to service. Reply App. 6a.

D. Courts have the Responsibility of Interpreting Treaties

Review of the 1935 agreement will not "intrude into the foreign relations power" as claimed by Izvestia, since the U.S. Government has stated its interpretation. In addition, interpretation of a treaty is a judicial function, which the courts cannot avoid merely because the result may have significant political overtones. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986).

E. Importance of Clear and Final Interpretation

In addition to *Compagnie NOGA* and *Russian Aluminum*, it is likely that there are, or will be, other cases in American courts involving Russian defendants considering the $10 Billion in annual bilateral trade between the U.S. and Russia. U.S. Dept. Of Commerce, Business Information Service for the Newly Independent States, *U.S.—Russia Trade Highlights (2000)*, *available at* http://www.bisnis.doc.gov/bisnis/

country/USRStrade_2000.htm. The *Semtek*, *Reardon* and *Konanykhine* cases which required that service of process be perfected via letters rogatory were based on incorrect assumptions of the U.S. Government's interpretation of the 1935 agreement since the U.S. position was not clearly defined at the time of these decisions. Konanykhine obtained the August 21, 2000 diplomatic note pursuant to the State Department's *Touhy Regulations*, 22 CFR Part 172. Other litigants and courts may not have access to this unpublished diplomatic note, and therefore, may continue to act on an incorrect assumption of U.S. policy. Therefore, Konanykhine's Petition should be granted to resolve the ambiguity over the interpretation of the 1935 Agreement and to reconcile the conflicts between the various U.S. District Court cases interpreting the agreement and the opposite positions of the U.S. and Russian Governments.

II. IZVESTIA RECEIVED ACTUAL NOTICE OF THE CASE, THEREFORE, IT IS IMMATERIAL WHETHER THE SERVICE WAS SENT VIA FIRST CLASS OR REGISTERED MAIL OR ADDRESSED IN ENGLISH OR RUSSIAN.

Notwithstanding the fact that it filed a response to Konanykhine's claims in the trial court, Pet. App. 24a-26a, Izvestia claims that service of process was improper because it was perfected via first class mail by the Virginia Secretary of the Commonwealth pursuant to the Virginia long-arm statute. Resp. Opp. 6-7. Izvestia neglects to mention that Konanykhine also served Izvestia pursuant to Russian law by registered mail dispatched in Russia by a Russian law firm. Reply App. 8a. In fact, the pleadings served by the Secretary of the Commonwealth and by Konanykhine's lawyers in Russia also contained Russian translations of the English language documents.

Izvestia does not even concede "that they ever received the process allegedly mailed by the Secretary of the Commonwealth or, in fact, answered it." Resp. Opp. 8. Also, Izvestia claims that since the Secretary of the Commonwealth transmitted the court documents to Izvestia using English characters, service is improper. This claim is at odds with Izvestia's admission in its motion to vacate default judgment that "[i]n mid-1998, Izvestia sent to the 'District court Arlington' a response to the Motion for Judgment, questioning the Court's jurisdiction and asserting complete defenses to the allegations set forth therein." Izvestia's Amended Motion to Vacate Default Judgment, p. 3, ¶10. *See* Pet. App. 24a-26a. The fact that Izvestia filed the response is conclusive proof that it received the documents sent by the Secretary of the Commonwealth. In fact, under Virginia law, a general appearance, such as the appearance made by Izvestia, "is a waiver of process, equivalent to personal service of process, and confers jurisdiction of the person on the court." *Nixon v. Rowland*, 192 Va. 47, 50 (1951). In any event, due process only requires that notice be given which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314-15 (1950). Moreover, contrary to Izvestia's claims, Konanykhine sent Izvestia notice of the Term Day where the court scheduled the trial. Reply App. 10a. Because Izvestia received actual notice of Konanykhine's action and of the Term Day where the Court set the trial date, the mailing pursuant to the Virginia long-arm statute and the registered mailing by Konanykhine's Russian lawyers pursuant to Russian law afforded Izvestia due process, and is therefore, valid.

III. DESPITE EXTENSIVE BRIEFING AND ORAL ARGUMENT, THE ONLY REASON THE TRIAL COURT VACATED THE DEFAULT JUDGMENT AND DISMISSED THE CASE WAS BECAUSE SERVICE WAS NOT PERFECTED VIA LETTERS ROGATORY.

Despite extensive briefing and oral argument the only reason the trial court vacated the default judgement and dismissed the case was because service was not perfected via letters rogatory. Pet. App. 2a-7a.

A. Izvestia had Sufficient Minimum Contacts with Virginia to Warrant the Trial Court's Exercise of Personal Jurisdiction

In addition to arguing defective service in its motions to vacate default judgment and dismiss case, Izvestia argued that it did not have sufficient contacts with Virginia to warrant the trial court's exercise of personal jurisdiction. During the trial, and at other stages during the litigation, Konanykhine provided proof that jurisdiction was appropriate in Virginia because:

1. Izvestia interviewed Konanykhine in Virginia in connection with the defamatory article at issue. V. Nadeine, *Gambler*, Izvestia, Sept. 16, 1997.

2. Izvestia delivered its articles into Virginia through the Internet and through newsstands. Reply App. 11a.

3. Izvestia delivered its articles to libraries in Virginia. Reply App. 13a.

4. Konanykhine suffered damages in Virginia, in part, because his political asylum claim was pending in Virginia. Reply App. 11a.

5. Izvestia's U.S. Bureau was located in Virginia until 1997.

In addition, it is foreseeable that *Izvestia Newspaper*, a leading daily newspaper in Moscow, would be read in Virginia since many U.S. Government agencies which monitor the Russian press are located in Virginia. The trial court vacated the default judgment and dismissed the case on the sole ground that service of process was not perfected via letters rogatory. Although Izvestia objected to this limitation when it endorsed the order vacating the default judgment, it did not raise any jurisdictional objections as cross-error in it's Cross-Appeal which it filed in the Virginia Supreme Court. *See* Pet. App 2a. Perhaps the reason why Izvestia did not raise its jurisdictional claims as cross-error is because the evidence of Izvestia's contacts with Virginia is overwhelming.

B. Compelling Reasons why the Verdict in Excess of Virginia's Punitive Damage Limitation Should be Upheld

It is correct that $30 Million of the $33.5 Million awarded by the jury represented punitive damages. Pet. App. 8a. Also, it is correct that VA. CODE ANN. §8.01-38.1 limits a punitive damage award to just $350,000. The Virginia Supreme Court has yet to directly address the constitutionality of this limitation. Because such limitations have been struck down by other state courts as violative of the right to a jury trial, Konanykhine extensively briefed and argued that the limitation is unconstitutional. The trial court ignored the limitation and entered judgment for the full amount of the jury verdict. Pet. App. 8a. In vacating the default judgment, the trial court did not rule on Izvestia's punitive damage limitation claim, but instead limited its grounds for doing so to the fact that service was not perfected via letters rogatory. Even if the court had stricken punitive damages altogether, the award representing compensatory damages would still be $3.5 Million.

IV. KONANYKHINE OBTAINED A LARGE VERDICT AGAINST ANOTHER RUSSIAN NEWSPAPER ON VIRTUALLY THE SAME SET OF FACTS AS *IZVESTIA* AND WITH THE SAME CONTACTS WITH VIRGINIA AS *IZVESTIA*.

In January 2000, a jury awarded Konanykhine $3 Million Dollars as compensatory damages resulting from *Kommersant Daily Newspaper*'s publication of defamatory articles. *Konanykhine v. Kommersant Publishing House*, Law No. 97-1206, (Arlington County (Va.) Cir. Ct. 2000). The issues presented in *Kommersant* were similar to *Izvestia*. Kommersant's counsel filed a lengthy motion to dismiss which was similar to Izvestia's jurisdictional argument. After extensive briefing and oral argument, the court denied Kommersant's motion to dismiss. Reply App. 15a. In fact, at trial, Kommersant was represented by Izvestia's former counsel, Raymond W. Konan Esq. Despite Mr. Konan's vigorous advocacy, the jury returned a verdict for $3 Million representing compensatory damages—an amount close to the $3.5 Million awarded as compensatory damages in *Izvestia*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 24, 2001